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U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**

DEPT. OF TRANSPORTATION

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Memorandum

NHTSA:01-877-5

Subject: Disclosure of Information under the TREAD Act

Date: OCT 27 2000

From: Frank Seales, Jr.
Chief Counsel

Reply to
Attn. of:

To: Rosalind A. Knapp
Acting General Counsel

The President is expected to sign the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, H.R. 5164. An issue has arisen regarding whether a provision in TREAD will significantly restrict the public availability of the information obtained by the Secretary under the new law. My review of the new provision leads me to conclude that it will have no effect on the disclosure of documents received by NHTSA. I seek your concurrence in this view.

TREAD will add a new subsection (m), Early Warning Reporting Requirements, to section 30166 of title 49, United States Code. The new section will enable the Secretary to obtain information from manufacturers of motor vehicles and motor vehicle equipment that might provide an early warning of safety defects.

Safety advocacy groups have questioned the inclusion in the early warning requirements of paragraph (4)(C), Disclosure. The paragraph reads as follows:

(C) DISCLOSURE.—None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121 of this title.

Paragraph (4)(C) supplements the current section 30167(b) of title 49, to which it refers. That provision reads as follows:

(b) Defect and noncompliance information.—Subject to subsection (a) of this section [which limits the Secretary's ability to disclose information entitled to confidential treatment pursuant to the Trade Secrets Act, 18 U.S.C. 1905], the Secretary shall disclose information obtained under this chapter related to a defect or noncompliance that the Secretary decides will assist in carrying out sections 30117(b) and 30118-30121 of this title. A requirement to disclose information under this subsection is in addition to the requirements of section 552 of title 5 or that is required to be disclosed under section 30118(a) of this title.



As we understand the issue raised by the advocacy groups, their concern is that paragraph (4)(C) states that "None of the information collected . . . shall be disclosed pursuant to section 30167(b) unless the Secretary determines that disclosure of the information will assist in carrying out sections 30117(b) and 30118 through 30121 . . ." (underlining supplied). The groups contrast this formulation with the corresponding language in 30167(b), which states that "the Secretary shall disclose information . . . that the Secretary decides will assist in carrying out" those sections (underlining supplied). In their view, this "inverts" the existing law, which they view as favoring disclosure "over and above the disclosure requirements of the Freedom of Information Act." (Letter from Joan Claybrook to Secretary Slater, October 19, 2000.)

Upon comparing the two provisions, we conclude that the differences between them do not support the advocacy groups' claim.

Ms. Claybrook's letter seems to suggest that the variation in language could be interpreted to prevent the disclosure of any early warning information submitted to the agency in the absence of a decision by the Secretary that disclosure of the information "will assist in carrying out" the purposes of the Act. However, the legislation clearly requires that such a decision be made prior to disclosure only when the disclosure is being made under section 30167(b), which by its terms is invoked only when the disclosure involves information that has been determined to be entitled to confidential treatment.

Moreover, section 30167(b) provides specifically that "A requirement to disclose information under this subsection is in addition to the requirements of section 552 of title 5 [the Freedom of Information Act]." Accordingly, neither section 30167(b) nor paragraph (4)(C) would affect the agency's initial decision regarding whether information submitted to the agency is entitled to confidential treatment. Such decisions will continue to be made in accordance with Exemption 4 of the Freedom of Information Act, the Trade Secrets Act and the agency's regulations concerning the treatment of confidential business information, 49 CFR Part 512.

Information determined to be entitled to confidential treatment, such as on the basis that its release would cause substantial competitive harm to the submitter of the information, would continue to be protected from disclosure, unless a decision is made to release the information under section 30167(b). Information determined not to be entitled to confidential treatment would continue, as before, to be released to the public. A determination that the information "will assist in carrying out" the Act would not need to be made first under section 30167(b), prior to the release of non-confidential information.

In addition, even under the limited circumstances when section 30167(b) or paragraph (4)(C) might be exercised, the differences between these two provisions would not lead to different results. Under either provision, if there is to be a disclosure, the disclosure must be made pursuant to section 30167(b), and the disclosure is dependent upon a decision by the Secretary that the disclosure "will assist in carrying out" the specified sections of the Act. As provided in section 30167(b), the Secretary is required to disclose information determined to be entitled to

confidential treatment if the Secretary makes the decision that the disclosure will "assist in carrying out" the Act. Paragraph (4)(C) simply clarifies that information submitted under TREAD that is determined to be entitled to confidential treatment cannot be disclosed in the absence of such finding.

The only reference to paragraph (4)(C) in the legislative history of TREAD occurred in a colloquy between Chairman Tauzin and Representative Markey, in which Chairman Tauzin agreed with Mr. Markey's statement that the "special disclosure provision for new early stage information is not intended to protect [information] from disclosure that is currently disclosed under existing law" 146 Cong.Rec H9629 (daily ed. Oct. 10, 2000). The most sensible reading of paragraph (4)(C) is that it was intended to replicate the effects of section 30167(b) for information obtained under the early warning section. This reading is consistent with the colloquy between Chairman Tauzin and Mr. Markey.

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Concur Rosalia Kyff

Non-concur _____

Date Oct 27, 2000